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**STIPULATED PENALTY DISPUTE, FERNALD OH6
890 008976 NOTICE OF ELEVATION OF DISPUTE
TO THE ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
UNDER**

04/03/91

**DOE/USEPA
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LETTER**



Department of Energy

Oak Ridge Operations

P.O. Box 2001

Oak Ridge, Tennessee 37831-8510

1991

2863

Mr. Raymond B. Ludwiszewski
Acting Assistant Administrator
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Ludwiszewski:

STIPULATED PENALTY DISPUTE, FERNALD OH6 890 008976
NOTICE OF ELEVATION OF DISPUTE TO THE ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY UNDER SECTION XIV OF THE 1990 CONSENT
AGREEMENT

On March 22, 1991, the U.S. Department of Energy (U.S. DOE) issued a formal written notice to the U.S. Environmental Protection Agency (U.S. EPA) elevating a dispute concerning stipulated penalties to the Administrator, U.S. EPA, for resolution. On February 15, 1991, the Regional Administrator had issued the formal written statement of position of U.S. EPA, Region 5, concerning the assessment of stipulated penalties for violations of the 1990 Consent Agreement for the Feed Materials Production Center (FMPC) at Fernald, Ohio. The deadline for U.S. DOE to elevate this dispute was extended twice by mutual agreement of the parties through March 22, 1991. This letter, together with the supporting statement of position, is U.S. DOE's support for the written notice of March 22, 1991, which elevated this dispute to the Administrator, U.S. EPA, for resolution. U.S. DOE believes that the assessment of stipulated penalties in the instant case is inappropriate for the reasons discussed below and as further documented in the attached position paper.

U.S. EPA and U.S. DOE attempted to resolve this dispute through negotiation after the Regional Administrator had issued his formal statement of position. On March 14, 1991, U.S. EPA proposed that U.S. DOE pay a penalty of \$249,375 to the Hazardous Substance Response Trust Fund and expend \$83,125 to fund an environmentally beneficial project at FMPC. In addition, U.S. EPA would agree to a three-month period during which revised schedules for the remedial response actions under the 1990 Consent Agreement would be negotiated. During this period the assessment of stipulated penalties would be tolled. If no agreement on revised schedules were reached, then the full stipulated penalties would become due and payable by U.S. DOE.

On March 22, 1991, U.S. DOE responded with a counterproposal under which U.S. DOE proposed to expend \$300,000 to address concerns related to the provision of alternate water supplies for neighbors of FMPC. U.S. DOE did not characterize this expenditure as a "penalty." In addition, U.S. DOE proposed a six-month negotiating period within which the parties would negotiate revised schedules for the response actions under the 1990 Consent Agreement. In the event that these negotiations failed, U.S. DOE would have the right to elevate the stipulated penalties dispute for resolution by the Administrator, U.S. EPA, under Section XIV of the 1990 Consent Agreement. U.S. EPA rejected this proposal. Consequently, U.S. DOE elevated this dispute on March 22, 1991.

The U. S. EPA statement of position concluded that U.S. EPA properly assessed stipulated penalties for U.S. DOE's failure to refer certain cases to the Department of Justice (DOJ) so that U.S. DOE could obtain access under Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); for U.S. DOE's failure to provide an acceptable Remedial Investigation (RI) Report and Risk Assessment for Operable Unit 4; and for U.S. DOE's failure to provide a complete Initial Screening of Alternatives for Operable Unit 3.

U.S. DOE recognizes its obligation and is committed to full compliance with the terms of the 1990 Consent Agreement, CERCLA, the National Contingency Plan, and applicable U.S. EPA policy and guidance with respect to the work under the 1990 Consent Agreement. U.S. DOE also recognizes the authority of U.S. EPA to enforce the terms of the Consent Agreement, to establish timetables and deadlines for the expeditious completion of the Remedial Investigation/Feasibility Study (RI/FS), and to assess stipulated penalties as specified in Section XVII of the Consent Agreement.

This dispute is being elevated for resolution because the assessment of stipulated penalties is unreasonable where U.S. DOE is proceeding in good faith to comply with the substantive requirements of the Consent Agreement. Second, U.S. DOE believes that U.S. EPA Region 5 is misinterpreting the intent and scope of the "model language" for the assessment of stipulated penalties as applied to the 1990 Consent Agreement.

In the case of U.S. DOE's failure to refer certain cases to DOJ for action under Section 104(e) of CERCLA, U.S. DOE agreed that it had neither obtained voluntary access to specific privately owned parcels of land identified in a proposed addendum to the RI/FS workplan for Operable Unit 5, nor had U.S. DOE referred these matters to DOJ. In November 1990, before the Notice of Violation, albeit after the expiration of the sixty-day referral period, U.S. DOE made energetic attempts to overcome private-property owners' refusals to provide voluntary access by identifying technically suitable alternate locations, seeking U.S. EPA's approval of these alternate locations and obtaining access to the alternate locations, while at the same time preparing the referrals to DOJ.

Under the stipulated penalties provision of the Consent Agreement, U.S. EPA should have exercised discretion in assessing stipulated penalties and taken into consideration mitigating factors such as U.S. DOE's good faith, identification of alternate locations (in one instance only twenty feet from the original location proposed to U.S. EPA), and attempts to negotiate voluntary access agreements while referring the cases to DOJ. U.S. EPA did not consider whether U.S. DOE's failure to refer would cause any delay in the submission of the RI Report for this Operable Unit or would delay the completion of the study which was the subject of the workplan addendum proposed to U.S. EPA.

U.S. EPA also assessed stipulated penalties for U.S. DOE's failure to provide an approvable RI Report and Risk Assessment for Operable Unit 4, the K-65 silos. U.S. DOE has admitted that this primary document was submitted before all the sampling activities identified in the approved workplan for this operable unit were completed. Prior to the submission of the document itself, it did not seek extensions of time under the applicable sections of the Consent Agreement when it experienced difficulties in carrying out the work. On the other hand, U.S. EPA knew that the schedule for this operable unit was predicated on the successful completion of silo sampling in 1989 and that U.S. DOE was not able to obtain a representative sample during this period.

In 1990, U.S. DOE obtained the services of a second contractor to perform the sampling. In furtherance of this effort, U.S. DOE's contractor prepared sampling procedures which, due to the resolution of comments and concerns, were not approved by U.S. EPA until after the RI Report and Risk Assessment had been submitted. In the meantime, the radon treatment system for the silos was shut down until the fall of 1990 due to a fracture in the piping and a prolonged repair. U.S. EPA was totally aware of the problems through technical information exchanges, the Consent Agreement monthly report, and monthly project manager meetings. Nonetheless, U.S. DOE submitted the primary document because U.S. DOE did not believe that the additional information would have a substantial impact on the remaining studies. In fact, U.S. EPA guidance provides for a phased approach to the RI/FS.

On December 21, 1990, U.S. EPA disapproved U.S. DOE's Initial Screening of Alternatives for Operable Unit 3 on the basis that the document did not consider all waste, drummed material, thorium, underground tanks, and buildings. U.S. DOE admits that it did not include the materials identified by U.S. EPA in its document because U.S. DOE did not believe that those materials were within the scope of the operable unit. In addition, work done prior to 1990 supported U.S. DOE's understanding of the scope of this operable unit. For example, in 1988, a Facilities Testing Plan was conducted to determine the nature and extent of any environmental impacts associated with the production area or identified suspect areas. The results of this survey were communicated to U.S. EPA and were utilized in developing the workplan for Operable Unit 3. U.S. DOE received comments from U.S. EPA concerning the results of the Facility Testing Plan but none of the comments concerned the scope of the inquiry and, therefore, U.S. DOE

proceeded in good faith on the assumption that our agencies were in agreement with the scope and approach prior to the issue arising in the summer of 1990. This issue was resolved through dispute resolution after the issuance of the Notice of Violation. It should also be recognized that at the time of the scoping of this operable unit both our agencies knew that a resumption of production was a possibility and that any potential releases of hazardous substance in the production area could be handled through established waste management practices.

Our two agencies have since resolved the issue and negotiated an approach to include these materials into an approvable Initial Screening of Alternatives. Given U.S. DOE's submission of the Initial Screening of Alternatives on schedule and U.S. DOE's willingness to bring the scope of the operable unit in line with U.S. EPA's position, U.S. EPA Region 5 should have exercised its discretion and not assessed stipulated penalties.

Our agencies negotiated "model language" for a stipulated penalties provision to be included in CERCLA interagency agreements. The language provided that stipulated penalties could be assessed if U.S. DOE did not submit a primary document on time or if U.S. DOE failed to meet a commitment with respect to an interim or final remedial action. The decision by U.S. EPA to assess stipulated penalties prior to remedial action implementation is based on an interpretation of the "model language" that U.S. DOE does not share.

Because U.S. EPA Region 5 and U.S. DOE have been operating under different understandings of how the Consent Agreement will be administered, U.S. DOE believes that the parties need to reflect upon these divergent views and reach agreement on a common understanding of how the Agreement should work. U.S. DOE stands ready to do this. The establishment of a common understanding in this area will enable our agencies to move forward with the work of cleaning up the FMPC in the most efficient fashion.

A complete exposition of U.S. DOE's position is contained in the position paper which is included with this letter. Representatives of U.S. DOE will make themselves available to you, should you desire to discuss this matter further.

Sincerely,

Joel A. Smith for
Joel La Grone
Manager

cc: Christian Holmes
Val Adamkus

U. S. DEPARTMENT OF ENERGY'S
WRITTEN NOTICE OF POSITION CONCERNING
STIPULATED PENALTIES UNDER THE 1990
CONSENT AGREEMENT FOR FMPC

The U.S. Department of Energy (U.S. DOE) and the U.S. Environmental Protection Agency (U.S. EPA) entered into a Consent Agreement (Attachment 1) under Sections 120 and 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the Feed Materials Production Center (FMPC) in April 1990. The 1990 Consent Agreement set forth the scope and schedule for the FMPC environmental restoration program and amended the CERCLA portion of the July 1986 Federal Facilities Compliance Agreement.

In December 1990, the U.S. DOE received three Notices of Violation for the following alleged violations: (1) that the U.S. DOE did not refer certain land access issues to the U.S. Department of Justice on a timely basis; (2) that the U.S. DOE submitted a Remedial Investigation Report" for Operable Unit 4 that contained insufficient sampling data; and (3) that the U.S. DOE submitted an "Initial Screening of Alternatives Report" (ISA) for Operable Unit 3 that did not propose alternative remedies for all relevant areas of the site and was therefore inadequate. The U.S. DOE was further advised that stipulated penalties would be assessed against the U.S. DOE for the alleged violations.

The U.S. DOE objected to the assessment of penalties as proposed by the U.S. EPA under each of the Notices of Violation. Because the dispute over the assessment of stipulated penalties was common to each of the Notices of

Violation, the issue was consolidated by the U.S. EPA, and in accordance with the Consent Agreement, formally raised by the U.S. DOE on January 25, 1991, to the Senior Executive Committee.

On February 15, 1991, after the Senior Executive Committee was unable to resolve unanimously the dispute, the Regional Administrator provided U.S. DOE the formal written statement of U.S. EPA's position on the dispute (Attachment 2). In summary, the Regional Administrator concluded that it was appropriate for U.S. EPA to assess stipulated penalties in three distinct instances for violation of the 1990 Consent Agreement. This paper constitutes U.S. DOE's written statement of position with respect to these stipulated penalties and supports elevating this dispute to the Administrator, U.S. EPA, for resolution under Section XIV of the 1990 Consent Agreement.

This dispute is twofold and involves: (1) the basic interpretation to be given to the language of Section XVII, STIPULATED PENALTIES, and (2) the reasonableness of the assessment of such penalties for each of the violations alleged in the light of U.S. DOE's actions and the proper exercise of U.S. EPA's discretion under the stipulated penalties provision. A detailed discussion of the U.S. DOE's position on each element of the dispute is provided below.

A. THE ASSESSMENT OF STIPULATED PENALTIES IN THE CONTEXT OF EACH
ALLEGED VIOLATION IS UNREASONABLE

In negotiating the stipulated penalties language with U.S. EPA, U.S. DOE believed it had reached agreement with U.S. EPA that stipulated penalties would be reserved as a final enforcement tool, when all cooperative methods had failed. Still less did U.S. DOE believe that stipulated penalties would be used as virtually an initial inducement to perform. Furthermore, it is unreasonable for U.S. EPA to assess stipulated penalties without considering mitigating factors such as good faith efforts to comply, what the ultimate effect of a noncompliance would be, whether the intent of the Consent Agreement was being impacted by the noncompliance, whether U.S. DOE was undertaking extraordinary efforts to regain schedule, and other mitigating factors as the interests of fairness and equity would require. A consideration of each of the assessments in this dispute will show that mitigating factors should have been considered; the failure to consider these factors renders U.S. EPA's actions unreasonable.

1. Operable Unit 5: Access

On December 4, 1990, U.S. EPA assessed stipulated penalties against U.S. DOE because U.S. DOE failed to refer certain cases to the U.S. Department of Justice for action under Section 104(e) of CERCLA in accordance with Section XXVIII of the Consent Agreement (Attachment 3). U.S. DOE had

submitted a proposal for an addendum to the Remedial Investigation workplan for Operable Unit 5 by facsimile on August 2, 1990 (Attachment 4) and formally on August 3, 1990 (Attachment 5). The purpose of the addendum was to investigate seepage from Paddys Run, a stream in the vicinity of the FMPC. On September 6, 1990, U.S. EPA approved the workplan addendum (Attachment 6). As approved, the workplan required access to privately owned properties in the vicinity of FMPC. The Consent Agreement provides U.S. DOE with thirty days within which to obtain voluntary access, after which U.S. DOE has thirty days to refer the matter to the U.S. Department of Justice for litigation, if voluntary access has not been obtained.

U.S. DOE was not successful in obtaining voluntary access to the specific privately owned parcels of land identified in the proposed addendum, nor had U.S. DOE referred these matters to the Department of Justice, as required by Section XXVII of the Consent Agreement. This type of failure, however, does not fall within the purview of the stipulated penalties section of the Consent Agreement because U.S. DOE's failure represents a failure to comply with a term or condition of the Agreement, not a term or condition relating to a removal or final remedial action as specified in the stipulated penalties language.

Under the Consent Agreement, U.S. EPA is not required to assess penalties (the provision states the U.S. EPA "may" assess a stipulated penalty). U.S. EPA should have taken into account the following mitigating factors. U.S. DOE's actions were not in bad faith; the Operable Unit

Manager simply was unaware of the Consent Agreement's mandatory referral requirement. U.S. DOE was actively working to get access to the private property.

In November 1990, before the Notice of Violation, albeit after the expiration of the sixty-day referral period, U.S. DOE's contractor identified access problems (Attachment 7). U.S. DOE directed its contractor to pursue technically acceptable alternates (Attachment 8). U.S. DOE's reasons for pursuing alternate well sitings varied from a concern for more rapid access to trying to avoid litigation with a widow who reportedly was complying with her dying husband's wish that U.S. DOE drill no more wells on his property. This effort continued even on the day that U.S. EPA issued the Notice of Violation (Attachment 9) and continued through December 19, 1990, when U.S. DOE sought U.S. EPA's approval of the alternate well locations (Attachment 10). Approval was given on January 23, 1991 (Attachment 11). U.S. DOE made the referrals at issue within thirty days of the Notice of Violation and assessment of penalty (Attachment 27). Negotiations with landowners also continued such that only one case may need to be filed even though three were referred to the U.S. Department of Justice.

U.S. EPA did not appear to consider whether U.S. DOE's failure to refer these cases will cause any delay to the submission of the primary document in question or even whether U.S. DOE's failure to refer will delay the completion of the seepage study. It is U.S. DOE's analysis that the failure to refer these cases by November 6, 1990, in and of itself, did not and will

not delay the submission of the relevant primary documents. U.S. EPA also did not consider the language of the access section itself which requires U.S. DOE to exercise its CERCLA Section 104(e) authority to assure the timely performance of the work. Alternate, but technically suitable sites, may have done more to assure the timely performance of the seepage study. Without a consideration of these factors prior to assessing stipulated penalties, U.S. DOE believes that U.S. EPA has acted hastily and has acted unreasonably.

2. Operable Unit 4: Incomplete Remedial Investigation Report

On December 7, 1990, U.S. EPA assessed stipulated penalties against U.S. DOE because U.S. DOE had submitted a RI Report and Risk Assessment that could not be approved because it was incomplete. U.S. DOE had not completed the field data gathering to support the RI Report (Attachment 12). Specifically, U.S. EPA found that, because the sampling of the materials in the silo, the sampling of berm materials, and the sampling of the glacial overburden beneath the silos had not been completed, and therefore, the results could not have been incorporated into the RI report, this primary document was unacceptable and could not be approved until after the sampling and data gathering was completed. U.S. DOE admits that it did not complete the activities specified in the RI Workplan, and that it did not formally seek an extension of time under the Agreement, but believed that the document, as submitted, was adequate. U.S. EPA Guidance for Conducting RI/FS Under CERCLA, OSWER Directive 7356.3-01; October 1988 and RI/FS

Improvements, OSWER Directive 9355.0-20 provides for use of a phased RI/FS approach in order to avoid prolonged delays while awaiting specific data elements.

The assessment of stipulated penalties in this case is unreasonable because U.S. EPA did so without considering mitigating or extenuating circumstances. For example, in November 1989, the parties negotiated the schedule for Operable Unit 4 while U.S. DOE was attempting to complete the sampling of the materials in the K-65 silos (Attachment 12 is a page from the September 1989 Technical Information Exchange during which U.S. EPA was briefed as to the status of the sampling effort). The difficulties in obtaining a complete sample mounted, and when the sampling effort was stopped in the winter of 1989-1990, it had not produced the required results. The impact of the failure of this sampling effort on U.S. DOE's ability to complete data gathering in a timely fashion is outlined in U.S. DOE's notice of dispute concerning the disapproval of the RI Report (Attachment 13, page 2). U.S. EPA was constantly kept informed of the difficulties U.S. DOE was encountering. See the relevant pages from the Technical Information Exchanges of April 1990 (Attachment 14) and June 1990 (Attachment 15). The Consent Agreement Reports, the relevant pages of which are contained in Attachment 16, for May and June 1990 also indicate that the sampling effort was identified as a problem area.

The sampling effort was also delayed because of the inability of U.S. DOE to obtain approval from U.S. EPA of revised sampling procedures which

U.S. DOE's contractor would use in sampling the silos. On July 25, 1990, U.S. DOE submitted the K-65 sampling procedures to U.S. EPA for approval (Attachment 17). On August 10, 1990, U.S. DOE reminded U.S. EPA of the need for review and approval and the critical nature of the approval to the completion of the sampling (Attachment 18). Verbal approval was given on October 9, 1990, and confirmed on October 11, 1990 (Attachment 19). By this time, the RI Report had already been submitted to U.S. EPA and had been disapproved because of U.S. DOE's failure to collect adequate data (Attachment 20). U.S. DOE's purpose in pointing out this chronology of events is not to engage in "finger-pointing," but simply to indicate that U.S. EPA was aware of and involved in U.S. DOE's efforts to overcome a very difficult technical problem in the most timely fashion. For U.S. EPA to ignore these facts at the time of assessing stipulated penalties is unreasonable.

It should also be noted that U.S. DOE experienced a breakdown in the Radon Treatment System at the K-65 silos during the period when work might have been performed on this operable unit. Machinery breakdown is one of the specifically enumerated events of force majeure in the "model language" which was included in the Consent Agreement. The failure of the system in March 1990 was totally unanticipated and contributed to the delay in completing the required data collection activities. A force majeure in fact occurred and U.S. EPA was fully aware of the breakdown of the Radon Treatment System, the impact of this event on the sampling activity, and the worker health and safety issues associated with such a breakdown. U.S. EPA

was kept aware of the status of U.S. DOE's attempts to deal with the breakdown and the schedule for repairs (Attachment 20).

Finally, U.S. EPA was informed by DOE that the RI Report and Risk Assessment would not contain certain sampling data. The DOE transmittal of the report on November 6, 1990, presented three options to U.S. EPA to address the need for additional sampling data: (1) U.S. EPA could extend the schedule for report submission to allow for completion of the sampling, (2) the parties could continue working under the current Consent Agreement schedule and incorporate sampling data in the report as it became available, and (3) U.S. DOE could remediate two silos on the current schedule, and extend the schedule for 2 additional silos. DOE proposed that EPA adopt the second option.

It is unreasonable for U.S. EPA, Region 5, to assess stipulated penalties under these circumstances, without acknowledging the nature of the problem encountered, U.S. DOE's attempts to overcome this problem, and the impacts the breakdown had on the work under the Consent Agreement.

The assessment of stipulated penalties should occur as a last resort to compel compliance. In this instance, there is no question of U.S. DOE's desire to comply; the agency, however, is being stymied by the inability to complete silo sampling. The completion of the primary document is contingent upon the successful sampling of the silos. It is true that other activities could have been done in the meantime; in the end, however, the

sampling is critical to the complete RI report.

3. Operable Unit 3; Initial Screening of Alternatives Report

On December 21, 1990, U.S. EPA notified U.S. DOE of its conclusion that U.S. DOE had violated the Consent Agreement by failing to include all waste, drummed material, underground tanks, thorium, and buildings in the ISA Report for Operable Unit 3 (Attachment 21). U.S. EPA assessed stipulated penalties on an ongoing basis until U.S. DOE submits an acceptable ISA report. U.S. DOE did not include the potential sources of releases identified by U.S. EPA in its December 21, 1990, Notice of Violation, in the ISA because U.S. DOE did not believe that their inclusion was within the scope of the Consent Agreement. Through Dispute Resolution, the parties have worked out an acceptable resolution of this dispute (Attachment 22) through the inclusion of these potential sources of releases.

Section X.A. of the Consent Agreement incorporates a previously approved RI/Preliminary FS workplan into the Agreement and makes it an enforceable part of the Agreement. The ISA Report complies with all the elements U.S. DOE included in the approved workplan. The approved workplan represented U.S. DOE's understanding of the cleanup while a resumption of production was still under consideration. Potential releases within areas used for

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production would be handled under U.S. DOE's waste management activities during production at the facility. The approach to Operable Unit 3 was developed in 1988 and 1989 through a program called the Facilities Testing Plan whose purpose was to identify the nature and extent of any environmental impacts associated with the production activities at FMPC. The results of the plan were provided to U.S. EPA (Attachment 23) and comments were solicited. The results of the Facilities Testing Plan were used to determine the scope of work for the contractor performing the RI/FS for U.S. DOE and formed the basis for the RI Workplan which was incorporated into the Consent Agreement. U.S. DOE assumed that, since U.S. EPA was aware of the Facilities Testing Plan and its results, and had approved the workplan, U.S. EPA was in agreement with the approach taken by U.S. DOE.

Because U.S. DOE had scoped Operable Unit 3 the way it had, U.S. EPA's insistence that additional potential sources of releases should be included in the ISA posed a clear problem for U.S. DOE because there was insufficient time to include these potential sources of releases in the ISA. This problem was discussed by the agencies during mid-1990 (Attachments 24 and 25 contain the relevant pages of the monthly reports); U.S. DOE articulated its position in a letter of November 21, 1990, to U.S. EPA (Attachment 26). U.S. EPA issued its disapproval and assessed stipulated penalties the following month.

In light of the resolution of this dispute (Attachment 22) in a manner which will have U.S. DOE considering potential releases of hazardous

substances within the complete production area, it is clear that the cleanup investigation will be done in a completely comprehensive fashion, consistent with CERCLA, the National Contingency Plan, and U.S. EPA guidance. There is no purpose to be served by the assessment of stipulated penalties in this context. U.S. DOE did not engage in a bad faith avoidance of its obligations under the Consent Agreement; U.S. DOE is willing to complete the ISA and the remainder of the tasks under Operable Unit 3 in a comprehensive manner. Stipulated penalties should not have been assessed.

B. INTERPRETATION OF SECTION XVII--STIPULATED PENALTIES

The U.S. DOE objects to the assessment of penalties as proposed by the U.S. EPA because the alleged failures on which the penalties are based do not fall within the purview of the stipulated penalties section of the Consent Agreement. In each instance, U.S. DOE's action represents an alleged failure to comply with a term or condition of the Agreement relating to a remedial investigation, not a term or condition relating to a removal or final remedial action as specified in the stipulated penalties language.

Section XVII - STIPULATED PENALTIES of the 1990 Consent Agreement, in relevant part, provides:

In the event that U.S. DOE fails to submit a primary document or draft ROD and Responsiveness Summary to U.S. EPA pursuant to the appropriate timetable or deadline in accordance with the requirements of this

Agreement, or fails to comply with a term or condition of this Agreement which relates to a removal or final remedial action, U.S. EPA may assess a stipulated penalty against U.S. DOE.

U.S. DOE disagrees with U.S. EPA's position because U.S. EPA has taken too expansive a reading of the language of Section XVII. U.S. EPA interprets the words "a term or condition of this Agreement which relates to a removal or final remedial action" to include any failure to comply with a term or condition of the Consent Agreement concerning the investigation of the site or the planning of the cleanup. As explained below, U.S. DOE believes that this is an unreasonably broad expansion of the scope of the stipulated penalties language in the Consent Agreement.

Section XVII is based on language concerning stipulated penalties which was negotiated by representatives of U.S. EPA and U.S. DOE within the broader context of the development of "model language" to be incorporated in future interagency agreements between the two agencies.

The issue common to the three disputes is one of a fundamental difference in interpretation over U.S. EPA's use of the stipulated penalties provision of the Consent Agreement. It does not authorize the assessment or imposition of stipulated penalties for the failures/deficiencies alleged by U.S. EPA to have occurred before implementation of a remedial action. The stipulated penalties provision is "model" language negotiated in 1988 between Headquarters' representatives of our agencies, and as such,

represents a voluntary agreement between our agencies to include stipulated penalties in interagency agreements (IAGs) pursuant to Section 120 of CERCLA of 1980, as amended, 42 U.S.C. Section 9620. Although the statute provides for civil penalties for enforcement of violations of IAGs entered into for remedial action implementation, stipulated penalties are not required. Numerous discussions were held between U.S. DOE and U.S. EPA Headquarters regarding the potential use and scope of stipulated penalties in IAGs entered into for remedial studies. The conclusion of those discussions resulted in U.S. DOE's agreement to include a stipulated penalties model provision for these IAGs while U.S. EPA agreed that the scope of application of those penalties would be very limited and the assessed amounts per week would be small. Specifically, U.S. DOE and U.S. EPA representatives agreed that penalties could be assessed for (1) the failure to submit any primary documents, and (2) the failure to comply with a term or condition relating to remedial action implementation. U.S. DOE agreed to the first because it agreed that schedule milestones should be met. U.S. DOE agreed to the second because the statute is clear that full civil penalties could be assessed to enforce the terms and conditions of the IAG for remedial action implementation. Therefore, U.S. DOE's understanding of the negotiated provision is that the phrase "fails to comply with a term or condition of this Agreement, which relates to a removal or final remedial action," refers to a failure on U.S. DOE's part during the implementation stage of a cleanup under an IAG. U.S. DOE does not believe that the model language is a broad authorization to assess stipulated penalties for alleged failure or deficiencies in the investigatory stage of activities under an IAG except

for failures to submit primary documents in accordance with agreed schedules. None of these disputes involve such a failure.

To further note U.S. DOE's good-faith efforts to cooperate with EPA, it is important to recognize that U.S. DOE entered into the 1990 Consent Agreement for the Feed Materials Production Center (FMPC) in advance of the statutory deadline for entering interagency agreements. Section 120(e)(2) of CERCLA, 42 U.S.C. Section 9620(d)(2) requires federal agencies to enter into interagency agreements such as the FMPC Consent Agreement within 180 days after completion of the remedial investigation and feasibility study. The purpose of those agreements is to facilitate "expeditious completion . . . of all necessary remedial action" (See Section 120(e)(2) of CERCLA). U.S. DOE also believes that it is inappropriate because it entered into an interagency agreement in good faith before it was required to do so under the statute.

In negotiating the 1990 Consent Agreement, U.S. DOE agreed that stipulated penalties were appropriate for assessment where U.S. DOE had failed to comply with a term of the Agreement relating to the implementation removal actions under Section IX of the Consent Agreement.


U.S. EPA's written statement of position of February 15, 1991, interprets the stipulated penalties provision is unreasonably broad. It interprets the stipulated penalties language in the Consent Agreement to apply to any provision relating to site investigation or cleanup planning as

within the meaning of the language "term or condition of this Agreement which relates to a removal or final remedial action." This would permit U.S. EPA to assess stipulated penalties for U.S. DOE's failure--even de minimis failure--to comply with the details of a workplan, since the Consent Agreement incorporates approved workplans into the Agreement, and makes them an enforceable part of the agreement.

U.S. EPA would also rely on language in the Consent Agreement to the effect that terms, unless otherwise defined or noted, have their statutory meaning. In its February 15, 1991, statement of position, U.S. EPA then reads the words "removal" in the stipulated penalties provision in its broad statutory meaning to include assessment and evaluation. Based on the discussions of the parties during the negotiation of the Consent Agreement, U.S. DOE believes that a fairer frame of reference for the term "removal" is the Consent Agreement itself. Section IX of the Consent Agreement details U.S. DOE's commitments with respect to four specific removals and other potential removals. Inasmuch as the parties to the Consent Agreement negotiated removals into the Agreement and inserted specifically the word "removal" into the stipulated penalties section, it is U.S. DOE's view that the more reasonable reading of the phrase "a term or condition . . . which relates to a removal" is a term or condition relating to one of the enumerated removals or a removal to be added in accordance with Section IX of the Consent Agreement, and not activities conducted in the investigative stage before the implementation of a removal action.

Finally, U.S. DOE's view of the scope of the stipulated penalties section is supported by the language of the section itself. If a "term or condition . . . which relates to a removal or final remedial action," covers the investigative stage of the cleanup process, there would have been no purpose in including the language covering a failure "to submit a primary document, draft ROD, and Responsiveness Summary," since the requirement to deliver these documents would have already been covered. Also, the word "final" is accorded no meaning or import in U.S. EPA's reading in the sentence or the analysis of the section.

In summary, U.S. DOE believes that the most reasonable reading of the scope of the stipulated penalties section should be as follows: U.S. EPA has the right, in the sound exercise of its discretion, to assess stipulated penalties if:

- (a) U.S. DOE fails to submit on schedule a primary document or draft ROD and Responsiveness Summary, pursuant to the appropriate timetable or deadline in accordance with the review and consultation provisions of the Consent Agreement; or
 - (b) U.S. DOE fails to comply with a term of the Consent Agreement relating to the implementation of removal actions in Section IX of the Consent Agreement, including U.S. DOE's obligations under Section XXVIII where access to non-U.S. DOE property is required to implement the removal action; or
 - (c) U.S. DOE fails to comply with a term of the Agreement with respect to the implementation of the remedy selected, i.e., remedial design
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and remedial action, including the requirements for access in Section XXVIII, where such access is necessary to implement the remedy.

Consistent with this reading of Section XVII-STIPULATED PENALTIES, U.S. EPA's assessment of stipulated penalties for U.S. DOE's failure to refer the access cases to the U.S. Department of Justice is inappropriate, since U.S. DOE's failure does not relate to a removal or final remedial action.

C. CONCLUSION

U.S. DOE is very concerned about the turn the administration of the Consent Agreement is taking. Confrontation appears to be replacing cooperation; a willingness to work at resolving problems in moving forward with the RI/FS and cleanup of the site is being supplanted by a seeming willingness to punish U.S. DOE for the problems encountered. Agencies must work together; we both serve the same public.

U.S. EPA and U.S. DOE should meet to resolve the obvious misunderstanding concerning stipulated penalties and reach agreement on this matter, since it seems that a meeting of the minds was not had during the negotiation of the "model" language. In addition, under the circumstances of this case, it is not in the interest of either agency for stipulated penalties to be assessed. U.S. DOE believes it to be in the interest of

both agencies to move towards cooperation through a decision not to assess penalties.

D. PAYMENT OF STIPULATED PENALTIES

In its December 4, 1990, Notice of Violation concerning Operable Unit 5, U.S. EPA requests that U.S. DOE remit the stipulated penalty to Region 5. Section XVII. D. of the Consent Agreement provides:

Stipulated penalties assessed pursuant to this Section shall be payable to the Hazardous Substances Response Fund from Funds authorized and appropriated for that specific purpose. (emphasis supplied)

U.S. DOE has no funds authorized and appropriated to pay stipulated penalties at this time. U.S. DOE does recognize its obligation to "take all necessary steps and make best efforts to obtain timely funding to meet its obligations under this Agreement" (See Section XX-FUNDING). No such request has been made to date, no funds have been either authorized or appropriated to meet this obligation. Should this dispute ultimately be resolved by affirming the appropriateness of stipulated penalties in this instance, payment, if any, would follow authorization and appropriation of funds for this purpose.